UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter

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AIR21 CASES

AIR21 POLICIES: EMPLOYER'S MANAGEMENT INTERESTS; PILOT RECORD IMPROVEMENT ACT

In ***Hirst v. Southeast Airlines***, 2003-AIR-47 (ALJ May 26, 2004), the ALJ found that the Complainant was discharged in violation of the employee protection provision of AIR21 when he called the Respondent's dispatcher to question an increase in the maximum gross weight of the aircraft he was to fly from 105,000 to 108,000 pounds. Complainant was referred to a Captain who assured the Complainant that he was confident that the increase was correct and in compliance with FAA regulations. Complainant requested that appropriate written documentation be faxed to him, but the Captain directed Complainant to fly the aircraft. Complainant refused and the Captain directed Complainant to report to Respondent's offices the next day to turn in his manuals and identification. Although the Respondent disputed whether the Complainant was thereafter discharged, the ALJ found that the record established that he was. The ALJ's decision contains a discussion of the statutory history of the whistleblower provision of AIR21 and of the inherent conflict of the interests protected by that law with an airline management's goals. The ALJ wrote:

> Regulations obliging pilots to record or report irregularities engender conflicts with managers trying to ensure on time performance, and maximize the number of revenue legs flown; management goals suffer when recorded deficiencies have to be corrected. *See generally,* John J. Nance & Charles David Thompson, *The Pilot Records Improvement Act of 1996: Unintended Consequences*, 66 J. Air L. & Com. 1225 (2001). Traditionally, a pilot facing the dilemma of reporting irregularities or antagonizing management could resign or accept termination rather than comply with pressure to overlook dangerous conditions. Before 1996, a pilot who resigned or was terminated in these circumstances could apply to another air carrier and give his explanation for the previous job separation or loss. *See* Nance & Thompson, *supra*, at 1226-28. The Pilot Record Improvement Act of 1996 (PRIA) complicates the pilot's situation, for PRIA requires air carriers to report the records of former employees to prospective airline employers. 49 U.S.C.A. § 44703(h)(1) (2003). An unfavorable entry in the employment record, especially one that an air carrier terminated the pilot for "unsatisfactory performance," becomes permanent and public, with little meaningful opportunity for explanation, and potentially ruinous consequences for honest and competent pilots. *Id*.; Nance &Thompson, *supra* at 1236.
>
> The statutes and regulations governing air commerce assign safety the highest priority. *See* 49 U.S.C.A. § 40101(a)(1) and (3), (d)(1) (2003). PRIA minimizes the possibility that a pilot with dangerously flawed judgment may obtain employment with an airline that does not know about earlier instances of incompetence, by making pilots' personnel files available to later potential employers. AIR 21 serves as a sort of counterbalance. It promotes safe air commerce by protecting pilots (and other airline employees) from implicitly or overtly coercive memoranda placed in their personnel files to discourage reports about deficiencies in operations or equipment. Both PRIA and AIR 21 reflect the central position pilots occupy in implementing the Congressional policy of making air travel as safe as possible.
>
> Federal law confers great responsibility on a pilot in command, and commensurate authority. "The pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft." FAR 91.3. The pilot has a non-delegable duty to ensure an aircraft is airworthy ....

EMPLOYEE/EMPLOYER; AIRPORT SCREENER IS NOT A COVERED EMPLOYEE UNDER AIR21; TSA IS NOT A COVERED EMPLOYER UNDER AIR21

In ***Fader v. Transportation Security Administration***, 2004-AIR-27 (ALJ June 17, 2004), the ALJ determined that an airport screener's recourse for statutory whistleblower protection, as a TSA employee, is with the Office of Special Counsel under the Whistleblower Protection Act, and not the whistleblower provision of

AIR21. Moreover, the ALJ found that "[n]o basis has been shown, which would establish that the TSA qualifies as an air carrier, directly or indirectly, under AIR21, or that TSA's statutorily and regulatorily defined federal mission to provide aspects of air carrier safety is dependent upon a contractual relation with an air carrier."

EVIDENCE; ADMISSIBILITY OF TAPE RECORDING

In ***Hirst v. Southeast Airlines***, 2003-AIR-47 (ALJ May 26, 2004), the ALJ rejected the Respondent's argument that a tape recording made by the Complainant, allegedly in violation of state law because it was without the consent of all parties, was inadmissible as evidence in an AIR21 whistleblower proceeding. The ALJ acknowledged that an electronic recording without consent of all parties is illegal in Florida, but nonetheless found that the recording was admissible. The recordings did not substantially differ from the recollections of the conversation and both parties' witnesses proved the content of the conversation. The ALJ also noted that his decision would have been the same without the tapes given his credibility determination about the Respondent's witness.

FORMER EMPLOYEE; EMPLOYEE ON DISABILITY RETIREMENT; IMPACT ON SCOPE OF AIR21 REMEDIES

In ***Friday v. Northwest Airlines, Inc.***, 2004-AIR-16 and 17 (ALJ June 16, 2004), the ALJ found that a pilot who had taken a disability retirement, and had been adjudicated to have voluntarily terminated his employment with the Respondent in both federal court proceedings and before another ALJ, was not an "employee" for purposes of AIR21 and the regulation at 29 C.F.R. § 1979.101. The Complainant argued that because he was included on the Respondent's seniority list, he was still an employee. The ALJ, however, reviewed the collective bargaining agreement and found that it only established that the Complainant continued to accrue seniority for seven years while on a disability pension, and not that the Complainant was still an employee. The ALJ then described the impact of the Complainant's status as a former employee on AIR21 whistleblower coverage:

> Since the Complainant was not a current employee of the Respondent's at the time of many of the various alleged retaliatory actions, the scope of the personnel actions prohibited by AIR 21 is more limited. The general rule, applied in other whistleblower and retaliation contexts is that complainants who are former employees are subject to unfavorable personnel actions when the alleged retaliatory act is related to or arises out of the employment relationship in some way. *Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994) (Title VII anti-retaliation provision); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (anti-retaliation provisions of the Fair Labor Standards Act); *Delcore v. Northeast Utilities*, 90-ERA-37 (Sec'y Mar. 24, 1995) (whistleblower protections of the Energy Reorganization Act).
>
> As a former employee who is on disability retirement, only those actions by the Respondent which affect the benefits the

> Complainant is entitled to as a former employee, his possible re-employment, or his ability to seek other employment (such as a blacklisting claim), are covered as a personnel action under AIR 21. This includes those rights under the Pilots' Pension Plan provided to pilots whose services with the Respondent have been severed but who are receiving a disability retirement pension under the Pilots' Pension Plan. (RX 35.)

Slip op. at 8.

PROTECTED ACTIVITY; ALLEGED ACT MUST IMPLICATE SAFETY DEFINITIVELY AND SPECIFICALLY

In ***Fader v. Transportation Security Administration***, 2004-AIR-27 (ALJ June 17, 2004), the Complainant's AIR21 complaint stated only that he had reported violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud. The ALJ, citing caselaw to the effect that protected activity under AIR21 must raise safety definitively and specifically, granted the Respondent's motion to dismiss for failure to state claim upon which relief can be granted.

ERA CASES

[Nuclear and Environmental Whistleblower Digest VI B]

CLARIFICATION: STATE OF THE LAW ON FAILURE TO SERVE RESPONDENT WITH COPY OF REQUEST FOR HEARING

In the June 1, 2004 Newsletter, a casenote described the ALJ's recommended decision in *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, 2004-ERA-9 (ALJ Apr. 29, 2004), in which the ALJ found that the Complainant's failure to serve the Respondent with a copy of his request for a hearing in violation of 29 C.F.R. § 2.4.4(d)(2) and (d)(3) deprived her of jurisdiction over the matter, notwithstanding that OSHA's determination letter did not mention this requirement. An appeal to the ARB has been filed by the Complainant. An Editor's Note observed that the ARB had declined to entertain an interlocutory appeal in *Hibler v. Exelon Nuclear Generating Co., LLC*, 2003-ERA-9 (ALJ May 4, 2004), in which the ALJ had disagreed with the caselaw relied on in *Shirani*.

The Editor's Note was not intended to convey that the ARB had supported a contention that failure to serve is fatal to jurisdiction, but rather only that ALJs disagree over the issue of whether failure to serve a respondent with a copy of request for hearing is jurisdictional. Although the ARB has not yet ruled on this issue under the amended Part 24 regulations, the Secretary in *Jain v. Sacramento Municipal Utility District*, 1989-ERA-39 (Sec'y Nov. 21, 1991) affirmed the ruling of the ALJ deciding that a complainant who failed to serve his request for a hearing on the respondent should not be penalized with dismissal where the respondent has not demonstrated any prejudice.

See also Lerbs v. Buca Di Beppo, Inc., 2004-SOX-8 (ALJ Dec. 30, 2003), in which the ALJ concluded that the SOX regulation on requesting a hearing was non-jurisdictional and therefore subject to equitable considerations where the Complainant had failed to serve the Respondent with a copy of the hearing request.

[Nuclear and Environmental Whistleblower Digest XVII E 2]
SETTLEMENT AGREEMENT; POTENTIAL FOR DISCLOSURE PURSUANT TO FOIA

In ***Doherty v. Hayward Tyler, Inc.***, ARB No. 04-001, ALJ No. 2001-ERA-43 (ARB May 28, 2004), the case settled while pending before the ARB. The parties requested by joint motion that the Board order that the terms of the agreement not be disclosed except as provided for in the agreement. The ARB, however, stated that parties' submissions, including a settlement agreement, "may become part of the record of the case and may be subject to the Freedom of Information Act... which requires federal agencies to make certain disclosures unless they are exempt from disclosure under the Act." Slip op. at 2 (citations omitted). Thus, the Board denied the joint motion.

[Nuclear and Environmental Whistleblower Digest XVIII C 8]
DISMISSAL FOR CAUSE; FAILURE TO SHOW GOOD CAUSE FOR FAILURE TO FILE TIMELY BRIEF BEFORE THE ARB

Failure to show good cause for failure to timely file a brief with the ARB is grounds for dismissal of the ARB appeal. ***Steffenhagen v. Securitas Sverige, AB***, ARB No. 04-034, ALJ No. 2004-ERA-3 (ARB May 20, 2004).

ENVIRONMENTAL CASES

[Nuclear and Environmental Whistleblower Digest XI B 2 c]
[Nuclear and Environmental Whistleblower Digest XIII B 18]
ADVERSE EMPLOYMENT ACTION/LEGITIMATE NON-DISCRIMINATORY REASONS; REQUIRING UNIQUE DISCLAIMERS ON SCIENTITIFIC PAPERS; FLAWED PEER REVIEW PROCESS; ACTIONS OF SUBORDINATE COLLEGUE; INACTION ON REQUEST FOR INFORMATION ABOUT COMPLAINANT'S QUALIFICATIONS; MONITORING OF WRITINGS WITH POLICY IMPLICATIONS; CONSULTATIONS WITH AGENCY COUNSEL

In ***Lewis v. Environmental Protection Agency***, 2003-CAA-5 and 6 (ALJ June 9, 2004), the Complainant, an EPA scientist, contended that the EPA discriminated against him as a result of his protected activity of publishing articles, making oral presentations and contacting Congress alleging that EPA's policy on sludge was not protective of human health. The Complainant contended, *inter alia*, that EPA retaliated by requiring that he use unique disclaimers in his writings and speeches, by collaborating against him with his adversaries, by subjecting him to a flawed peer review process, and by disseminating papers that criticized his research and harmed his reputation.

In a detailed recommended decision, the ALJ found that, although the disclaimers requested by EPA may not have been typical of what it required on similar writings, it was not an adverse action because the Complainant had not shown that requiring the disclaimers had an adverse effect or resulted in a tangible consequence, either work related or otherwise. The ALJ wrote that "Although Complainant may have been annoyed at the requests to change disclaimers, annoyance does not reach the level of a material consequence." Slip op. at 56. The ALJ also observed that the proposed changes were accurate and appropriate. The ALJ also found that the Complainant's writings and oral presentations were unique in their level of criticism of EPA policy, and therefore, even if the disclaimers had a tangible job consequence, EPA nonetheless had a legitimate, non-discriminatory reason for requiring such. The ALJ wrote: "EPA has every right to explicitly disclaim endorsement of writings and oral presentations by its employees that significantly criticize EPA policy and even accuse EPA of endangering the public." Slip op. at 56.

In regard to the flawed peer review process, the ALJ determined that Complainant had established no resulting tangible job consequence.

Complainant did establish that a fellow EPA scientist (at a lower grade level) disseminated a "White Paper" which had been prepared by the defendant in a lawsuit in which the Complainant was appearing as an expert witness for the plaintiff. The White Paper was highly critical of Complainant's research regarding an EPA rule on biosolids. The ALJ, however, found that the fellow scientist had no supervisory authority over the Complainant, that the Complainant had not established that supervisors were aware of the dissemination, and that once put on notice of the dissemination, the fellow scientist was counseled. The Complainant contended that he should have been consulted prior to the discipline of the fellow scientist, but the ALJ found that the Respondent's obligation was only to take "prompt remedial action" upon learning of a co-worker's harassing behavior to escape liability -- not to also consult with the Complainant prior to taking the remedial action.

Complainant alleged that EPA violated the whistleblower laws when it failed to respond to inquiries about the White Paper and whether EPA agreed with its contents. The ALJ found that EPA did not have an obligation to respond to such inquiries and even if it did, the Complainant failed to establish a tangible job consequence.

Complainant contended that EPA violated the whistleblower laws when it forwarded all of his scientific and technical writings to headquarters. The ALJ found, first, that the guidance was only to forward writings if it had policy implications, which was consistent with EPA practice generally. Complainant's supervisors also consulted with EPA's Office of General Counsel regarding information they received regarding the Complainant because of his whistleblower allegations. Such consultations were unique to the Complainant. The ALJ found that despite the uniqueness of such consultations, the Complainant had not established that they were adverse employment action, having presented no evidence that such consultations produced tangible job consequences. Moreover, the ALJ concluded that "EPA is entitled to consult OGC to ensure that it is not making discriminatory decisions regarding one of its employees." Slip op. at 65.

[Nuclear and Environmental Whistleblower Digest XIV B 1]

EMPLOYER-EMPLOYEE RELATIONSHIP; COMPLAINANT'S BARE ASSERTION OF A CONSPIRACY INADEQUATE TO ESTABLISH TRIABLE ISSUE OF FACT

In ***Seetharam v. General Electric Co.***, ARB No. 03-029, ALJ No. 2002-CAA-21 (ARB May 28, 2004), the Complainant alleged that his former employers and several other companies conspired to discriminate against him because of his protected activities under various environmental statutes. The Respondents filed motions for summary decision based on the contention that they were not the Complainant's employers and had no employment relationship with him, and the presiding ALJ dismissed the complaint on that basis. On appeal to the ARB, the Complainant argued that the Respondents affected the terms and conditions of his employment -- resulting in his discharge -- " because they had mutual business dealings as vendors, contractors, lenders, or partners, which rendered them 'a joint enterprise' that conspired to violate the environmental protection laws and blacklist him." Slip op. at 3, citing Complainant's brief. The ARB noted that several Respondents submitted affidavits in support of their motions for summary decision showing that they either never employed the Complainant or that they had no influence or control over his subsequent employment. All Respondents asserted that they had nothing to do with the Complainant's reassignment or discharge. The ARB found that such affidavits shifted the burden to the Complainant to produce enough evidence to create a triable issue of fact regarding the employer-employee relationship, which he failed to do -- Complainant's bare allegations of conspiracy being inadequate to create a genuine issue of material fact. Thus, the ARB affirmed the ALJ's dismissal of the complaint.

[Editor's note: The company with which the Complainant was employed when discharged is the subject of a separate complaint which was not part of the instant proceeding].

SOX CASES

ADVERSE EMPLOYMENT ACTION; FORMER EMPLOYEE

In ***Harvey v., The Home Depot, Inc.***, 2004-SOX-36 (ALJ May 28, 2004), the ALJ found that the Complainant had failed to state a claim upon which relief may be granted where the complaint alleged that the Respondent violated the whistleblower provision of the SOX because the Respondent had stated that the Complainant was harassing the Respondent's Board of Directors and Executives. Specifically, the Complainant had filed a professional responsibility complaint against the Respondent's attorney, and that attorney's representative had filed a response to the state committee stating that the Complainant's grievances were "part of an on-going campaign by Mr. Harvey to harass Home Dept and its employees." The Complainant was no longer employed by the Respondent when this statement was made.

The ALJ found that "with the exception of blacklisting or other active interference with subsequent employment, the SOX employee protection provisions essentially shelter an employee from employment discrimination in retaliation for his or her protected activities, while the complainant is an employee of the respondent." Slip

op. at 4-5 (footnote omitted). Thus, the harassment comment was not an adverse personnel or employment action. Nor was there any evidence to support a finding that the harassment comment adversely affected the terms or conditions of any subsequent employment by the Complainant.

FEDERAL COURT JURISDICTION; PROOF THAT COMPLAINT WAS SENT TO THE SECRETARY OF LABOR IN WASHINGTON, DC; FAILURE OF PLAINTIFF TO FILE WITH OSHA IN APPLICABLE GEOGRAPHICAL REGION AND TO CONTACT DOL TO INQUIRE ABOUT THE COMPLAINT DOES NOT ESTABLISH BAD FAITH REQUISITE TO DEPRIVE DISTRICT COURT OF JURISDICTION

In ***Murray v. TXU Corp.***, 279 F.Supp.2d 799 (N.D. Tex. 2003), the Defendants moved to dismiss the Plaintiff's federal court claim under the SOX whistleblower provision for lack of subject-matter jurisdiction, arguing that there was a question as to whether the Plaintiff had timely filed a complaint with the Secretary of Labor prior to filing in the federal court. The Plaintiff presented evidence showing that his counsel sent a SOX complaint by Federal Express to the Secretary of Labor at the Frances Perkins Building in Washington, D.C., and invoked the well recognized presumption concerning receipt of properly addressed, paid-for, and mailed documents. The Defendants responded by asserting that there was no evidence that the person who signed for the documents was authorized to accept a complaint or even worked for DOL or the Federal Government. The court, however, observed that the Defendant presented no evidence describing DOL procedure for handling Fed Ex deliveries.

The Defendants also urged the court to infer nonreceipt based on the Secretary's inaction. The court, however, found the Secretary's lack of action on the complaint to be insufficient to rebut the presumption of receipt of the complaint.

The Defendants argued that the Plaintiff should be found to have contributed to DOL's failure to decide the claim in 180 days because he did not file with the OSHA Area Director for the applicable geographical area, and did not contact the Secretary after failing to receive a written report 60 days after filing. The court found that such factors fell short of a showing the Secretary's delay was due to bad faith on the part of the Plaintiff. The court noted that the statute does not identify whose burden it is to make a showing of bad faith, but found that under the posture of the case, the Defendants bore that burden.

Finally, the court denied the Defendants' motion to stay the proceeding to permit the Secretary time to investigate the Plaintiff's claims.

FRIVOLOUS COMPLAINT SANCTION; NEW LAW REGARDING WHICH PARAMETERS OF COVERAGE NOT YET WELL DEFINED

In ***Hopkins v. ATK Tactical Systems***, 2004-SOX-19 (ALJ May 27, 2004), the Respondent moved for reimbursement of attorney fees up to $1,000 under 29 C.F.R. § 1980.110(b), which permits such a sanction if the ALJ determines that the complaint was frivolous or brought in bad faith. The ALJ reviewed an ALJ and an ARB decision interpreting a similar provision under the AIR21 whistleblower law, and

interpretations of frivolous legal actions related to FRAP 38 and 28 U.S.C. § 1915(e)(2). Although she concluded that the complaint bordered on frivolous as a SOX complaint, it would not have been frivolous if properly filed under the environmental whistleblower statutes (the complaint about release of sludge by a water authority having been filed only under SOX). Although the pro se Complainant had not responded to the ALJ's order to show cause on jurisdiction, the ALJ observed that such a lack of response might evidence a concession that the case should be dismissed rather than continued pursuit of a frivolous claim. The ALJ also found lack of an assertion of prejudice by the Respondent, nor of bad faith, harassment or improper motives on the part of the Complainant. Most important in the ALJ's view was the fact that the SOX was relatively new and consequently its parameters are not certain. Thus, "it would be difficult to conclude that any complaint alleging that the reporting of wrongful activity by a publicly traded corporation [leading] to an adverse employment action ... would lack 'an arguable basis in law or fact.'" Slip op. at 9. The ALJ had dismissed the complaint on summary decision based in part on the failure of the complaint to relate to securities fraud.]

PROTECTED ACTIVITY; GENERAL INQUIRIES ABOUT ACCOUNTING PRACTICES

In ***Lerbs v. Buca Di Beppo, Inc.***, 2004-SOX-8 (ALJ June 15, 2004), the ALJ noted that under the pertinent case law, in order for a whistleblower to be protected the reported information must have a certain degree of specificity. Thus, where the Complainant merely made general inquiries about the propriety of certain accounting entries, and never identified particular concerns about the Respondent's conduct that the Complainant may have believed to be illegal, the ALJ found that the Complainant failed to establish that he had engaged in protected activity under the whistleblower provision of the SOX.

PROTECTED ACTIVITY; REQUIREMENT OF FRAUD AGAINST SHAREHOLDERS

In ***Hopkins v. ATK Tactical Systems***, 2004-SOX-19 (ALJ May 27, 2004), the Complainant filed a SOX whistleblower complaint premised on his raising the question of whether Respondents' systems illegally resulted in the release of sludge water into the ground water system. The ALJ found that such an activity fails to state a cause of action under the whistleblower provision of the SOX, which contemplates the prevention of fraudulent actions relating to securities. The ALJ wrote:

> The Sarbanes-Oxley Act provides whistleblower protection for employees of publicly traded companies who provide information or participate in an investigation relating to violations of certain criminal code provisions relating to fraud (including "fraud and swindles"; "fraud by wire, radio, or television"; bank fraud; and securities fraud), rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders. The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. *See, e.g.* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to

> employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company.") The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." *Id.* In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." *Ames Department Stores Inc., Stock Litigation,* 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit.
>
> The protected activity alleged in the complaint involves the Complainant's reporting (both internally and to regulatory agencies) of ATK's release of sludge water into the ground water system due to poor maintenance and overdue inspections. The complaint does not address any kind of fraud and it does not involve transactions relating to securities. Moreover, there has been no allegation that the activities complained of involved intentional deceit or resulted in a fraud against shareholders or investors. Therefore, the matters complained of within the complaint do not fall within the purview of the employee protection provisions of the Act.

The ALJ found that Complainant's complaint may have fallen within the environmental statutes, but did not remand to OSHA for an investigation under those laws because the complaint was also untimely under any of those statutes.

PROTECTED ACTIVITY; SCOPE OF SOX COVERAGE; RACIAL DISCRIMINATION

In ***Harvey v. The Home Depot, Inc.***, 2004-SOX-20 (ALJ May 28, 2004), the Complainant first filed a distinct SOX complaint beyond 90 days of his termination, and therefore that complaint was untimely. In addition, he had mailed three letters to the Secretary of Labor within 90 days of his termination from employment. If one of those filings raised a SOX complaint, Complainant would have filed a timely complaint. Thus, the ALJ analyzed what, specifically, constitutes a viable complaint under the whistleblower provision of SOX. The ALJ wrote:

> In regards to protected activities, a fundamental protected activity under SOX, and the activity most relevant in Mr. Harvey's case, involves an employee providing information to supervisory authority based on a reasonable belief that a SOX violation has occurred. Under the statute, 18 U.S.C. § 1514A (a) (1), a SOX violation must relate to at least one of the following specific categories:
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> 1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds and swindles. This provision establishes that use of the Post Service or private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent

pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by wire, radio, or television. This provision establishes that use of wire, radio, or television communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank fraud. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime punishable by not more than thirty years imprisonment.

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities fraud. This provision establishes that executing a scheme or artifice a) to defraud any person in connection with any security of an issuer of a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15 (d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime punishable by not more than twenty-five years imprisonment.

5. Any rule or regulation of the Securities Exchange Commission.

6. Any provision of federal law relating to fraud against shareholders.

Slip op. at 12-13 (footnotes omitted).

The ALJ found that the Complainant's allegations did not relate to mail fraud, wire fraud, bank fraud or securities fraud -- nor did they point to violations of SEC rules. That left the question of federal law relating to fraud against shareholders. The Complainant's central complaint was about systemic and individual racial discrimination. The ALJ found that the Complainant had failed to show that he had raised a reasonable complaint of systemic discrimination. In regard to individual discrimination, the ALJ wrote:

... In determining whether these alleged violations of individual employment rights involve a federal law related to fraud against shareholders, an implicit argument may be made that a company which permits discriminatory practices despite its public policy of equal opportunity is acting contrary to the best interests of its share holders. While that argument has understandable appeal, a SOX protected activity must involve an alleged violation of a federal law directly

related to fraud against share holders. In this case, the federal law actually prohibiting individual employment discriminatory practices, Title VII, is based on individual rights and establishes procedures to address illegal employment discrimination; it was not enacted to preclude fraud against shareholders. In contrast, a federal law directly linked to the prevention of fraud against shareholders is the SOX statute itself. As set out in the SOX preamble, Congress imposed additional, specific legal requirements and standards on corporations, directors, senior financial officers, lawyers, and accountants to protect shareholders by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws and for other purposes. For example, SOX includes Section 302 (corporate officer certification that a financial disclosure is accurate and does not contain any untrue statement of material fact), Section 401 (enhanced disclosure requirements for mandated financial reports), and Section 406 (code of ethics for senior financial officers).

I have also considered another reasonable argument that since SOX mandates the accuracy of corporate disclosures, a reported incident of racial discrimination within a publicly traded company that represents itself to be non-discriminatory may amount to violation of a SOX disclosure requirement and thus involve a federal law related to fraud against shareholders. That is, although the racial discrimination is prohibited by a different federal law, its existence may also adversely affects the accuracy of corporate disclosures mandated by SOX, which is a federal law concerning fraud against shareholders.

While this presentation also has some logical appeal, the connection becomes tenuous upon close examination of SOX. Specifically, Section 302's requirement for the accuracy of material facts relating to finances, demonstrates Congress' intention to protect shareholders by requiring accurate reporting of a corporation's financial condition. The two key components are accurate accounting and financial condition. Whether a supervisor's acts of individual discrimination comply with the company's stated equal opportunity standards has a very marginal connection with those two components. Perhaps, the failure to disclose a class action lawsuit based on systemic racial discrimination with the potential to sufficiently affect the financial condition of a corporation might become the subject of a SOX protected activity if an individual complained about the failure to disclose that situation. However, individual, rather than systemic, discrimination does not reach that materiality threshold in terms of a corporation's financial condition. Alleged individual violations of Title VII would not fall into the category of SOX mandated disclosures. Further, Mr. Harvey's particular discrimination complaints to supervisors and the Board of Directors centered on the alleged existence of racial and employment discrimination rather than the company's failure to report such discrimination to the public.

Slip op. at 14-15 (footnote omitted).

PROTECTED ACTIVITY; SCOPE OF SOX COVERAGE; CHALLENGE TO INTERNAL COMPANY POLICY

In ***Reddy v. Medquist, Inc.***, 2004-SOX-35 (ALJ June 10, 2004), the Complainant alleged that the Respondent violated the whistleblower provision of the SOX because she was terminated from employment after expressing concerns to management regarding an internal company policy and its alleged deleterious impact on the rate of pay for medical transcriptionists. The ALJ granted Respondent's motion to dismiss for failure to state a claim upon which relief can be granted because the Complainant failed to show that she was engaged in protected activity. The ALJ found that "the evidence demonstrates the complaints concerned internal company policy as opposed to actual violations of federal law."

PROTECTIVE ORDER; POLICY OF PROTECTING IDENTITY OF WHISTLEBLOWERS BALANCED AGAINST POLICY OF PERMITTING ROBUST DISCOVERY

In ***In re Initial Public Offering Securities Litigation***, 220 F.R.D. 30 (S.D. N.Y. 2003), the Plaintiffs alleged securities fraud in connection with certain technology stocks that went public in the late 1990s. The Plaintiffs' counsel relied in framing the complaint on information provided by certain unnamed investors who were allegedly required to enter into tie-in agreements and to pay undisclosed compensation to the Defendant investment banks. The Defendants sought in discovery the identity of those investors. The Plaintiffs argued that this information was protected by attorney work product doctrine or by a public policy protecting whistleblowers. The court rejected the work product argument. The public policy argument was grounded in the argument that retaliation would be a concern if the Plaintiffs sources were revealed -- the Plaintiffs pointing to the SOX whistleblower protection provision as evidence of a trend in favor of protecting corporate whistleblowers, and to a Second Circuit decision holding that securities fraud pleading need not reveal the identity of confidential source, *Novak v. Kasks*, 216 F.3d 300. The court, however, held:

> The issue here does not raise the policy concerns addressed in the Sarbanes-Oxley legislation or the *Novak* rule, both of which encourage whistle-blowers to expose corporate wrongdoing by protecting them from retaliation. Once litigation is pending, the balance of interests changes. While it is important to protect whistle-blowers, it is also important, once the whistle is blown, to allow all parties an equal opportunity to engage in the robust discovery permitted by the Federal Rules.

The court found that there was no evidence presented establishing that the investors would be subjected to retaliation -- stereotyped and conclusory statements being insufficient to support a finding of good cause to issue a protective order. The court also took into consideration that the potential witnesses had information regarding

the central allegations of the case, that the cases raised issues of great import to the public, and that the Defendants had significant interests at stake in the litigation -- both monetary and in regard to the ways securities are underwritten. The court therefore denied the issuance of a protective order, subject to the parties' prior agreement to treat the identity of the customers as confidential.

RETROACTIVE APPLICATION; DATE OF ALLEGED RETALIATION RATHER THAN DATE OF PROTECTED ACTIVITY DETERMINES WHETHER THE ACT APPLIES

In ***Lerbs v. Buca Di Beppo, Inc.***, 2004-SOX-8 (ALJ June 15, 2004), the Respondent moved for summary decision on the ground that the Sarbanes-Oxley Act was not in effect when the Complainant engaged in the activity that he contends was protected. The ALJ, however, held that it is the date of the alleged retaliatory action rather than the date of the protected activity that determines whether the Act applies. Thus, retroactive application of the SOX whistleblower provision was not implicated.

STAA CASES

[STAA Whistleblower Digest II B 2 d ii]
TIMELINESS OF COMPLAINT; COMPLAINANT'S NOTICE TO FMSCA THAT HE HAD BEEN FIRED IS INSUFFICIENT TO SUPPORT EQUITABLE TOLLING UNDER WRONG FORUM DOCTRINE

In ***Hoff v. Mid-States Express, Inc.***, ARB No. 03-051, ALJ No. 2002-STA-6 (ARB May 27, 2004), the Complainant had filed a complaint with the FMSCA alleging that his employer had violated federal motor carrier safety regulations. Several weeks later he was fired and he then contacted FMSCA to inform it about the termination of employment. About a year later FMSCA contacted the Complainant by letter to inform him that citations had been issued against the employer; however, Complainant learned at that time that FMSCA had only investigated under the Federal Motor Carrier Safety Act and had not investigated a STAA retaliation claim. The Complainant then filed a STAA complaint with OSHA. OSHA and the ALJ dismissed the complaint as untimely. An STAA complaint must be filed within 180 days after the alleged violation occurred, and the Complainant's OSHA complaint was more than a year after the alleged violation.

On appeal, the ARB agreed with the ALJ that equitable principles did not apply to toll the limitations period. Analyzing under the familiar *School Dist. of Allentown v. Marshall,* 657 F.2d 16, 19-21 (3d Cir. 1981) equitable tolling principles, the ARB found that the Complainant had not demonstrated that he raised "the precise statutory claim in issue" with the FMSCA, i.e., that he was discharged in retaliation for activity protected by the STAA. In addition he did not contend that the Respondent misled him into filing a STAA complaint in the wrong forum, or that there were any extraordinary circumstances that prevented him from filing in the correct forum.

[STAA Whistleblower Digest II H 4]
JURISDICTION OF ARB TO CONSIDER A PETITION FOR MANDAMUS

In ***Somerson v. Eagle Express Lines Inc.***, ARB No. 04-046, ALJ No. 2004-STA-12 (ARB May 28, 2004), the Complainant sought a writ of mandamus from the ARB based on the contention that OALJ had refused to hold a hearing on his STAA complaint and was violating his and his counsel's First Amendment rights. The ARB ordered the Complainant to show cause why the petition should not be dismissed for lack of jurisdiction. The Complainant's response was to argue that OALJ was violating a statutorily mandated deadline. The ARB found that this response confused the basis for the request for a writ of mandamus with the issue of the Board's jurisdiction to consider such a petition. Based on the failure of the Complainant to show cause (and not deciding whether the ARB had the authority to issue a Writ of Mandamus), the ARB denied the motion. The ARB also denied a motion to compel OALJ to cease and desist from violating First Amendment rights because the Complainant had failed to establish the ARB's authority to issue such a writ in the absence of a decision by an ALJ.

[Editor's note: The scheduling of a hearing on the merits of the Complainant's STAA complaint had been stayed pending a section 18.34(g) hearing on the qualifications of his counsel].

[STAA Whistleblower Digest IV C 2 a]
PRETEXT; COMPLAINANT'S PURPORTED FALSIFICATION OF EMPLOYMENT APPLICATION; LACK OF SUPPORTING EVIDENCE AND TEMPORARY PROXIMITY INDICATES PRETEXT

In ***Cefalu v. Roadway Express, Inc.***, 2003-STA-55 (ALJ May 20, 2004), the ALJ found that the Respondent's proffered legitimate business reason for firing the Complainant - falsification of his employment application -- was a pretext for discrimination where the Complainant was fired five hours after his statement (alleging that the Respondent had required him to falsify logs and work more hours than allowed), was proffered at a grievance committee hearing in support of another truck driver, and where the Respondent presented no evidence to establish that such was the reason for the discharge or that the Complainant did in fact falsify his application. The ALJ also found that even if the Respondent had offered such evidence, the timing of the case strongly suggested that the purported falsification was a pretext.

[STAA Whistleblower Digest V B 2 a iii]
PROTECTED ACTIVITY; REASONABLE APPREHENSION; PRE-TRIP INSPECTION BASED ON DRIVER'S GENERALIZED DESIRE TO SATISFY HIMSELF THAT THE VEHICLE IS SAFE

In ***Calhoun v. United Parcel Service***, 2002-STA-31 (ALJ June 2, 2004), the Complainant was disciplined for making pre-trip inspections that were more extensive than the Respondent's standard procedure. Although the ALJ found that

such inspections were protected activity under the "refusal to drive" provision at 49 U.S.C. § 31105(a)(1)(B) and the "actual violations" provision at 49 U.S.C. § 31105(a)(1)(B)(i), he found that they were not protected activity under the "reasonable apprehension of serious injury" provision at 49 U.S.C. § 31105(a)(1)(B)(ii). The ALJ found that the Complainant had not shown that the assigned vehicles were unsafe, and that his inspections were based only on his generalized desire to satisfy himself that his vehicles were safe, and not any mechanical problems, physical conditions or weather conditions which, at the time he refused to drive, would have led a reasonable person to fear for his or her safety or that of others.

[STAA Whistleblower Digest V B 2 b]
PROTECTED ACTIVITY; REFUSAL TO DRIVE UNTIL COMPLAINANT'S PRE-TRIP INSPECTION ROUTINE WAS COMPLETED

In ***Calhoun v. United Parcel Service***, 2002-STA-31 (ALJ June 2, 2004), the Complainant was disciplined for making pre-trip inspections that were more extensive than the Respondent's standard procedure. The ALJ found that such inspections were protected activity under the "refusal to drive" clause of 49 U.S.C. § 31105(a)(1)(B), even though in each instance the Complainant eventually drove the vehicle. The ALJ distinguished *Zurenda v. J&K Plumbing & Heating Co. Inc.*, ARB No. 98-088, ALJ No. 1997-STA-16 (ARB June 12, 1998), on the ground that the ALJ had found in that case that the evidence supporting the safety related nature of the employee's conditional refusal to drive was not credible, whereas in the instant case it was beyond question that the Complainant's refusals to drive until he completed pre-trip inspections were safety related.

[STAA Whistleblower Digest IX B 3 e]
EMOTIONAL DAMAGES; MODEST AWARD WHERE RESPONDENT'S CONDUCT WAS NOT AS EGREGIOUS AS IN OTHER CASES AND THE EVIDENCE OF EMOTIONAL DAMAGE WAS NOT EXTENSIVE

In ***Calhoun v. United Parcel Service***, 2002-STA-31 (ALJ June 2, 2004), the ALJ found that the Respondent violated the STAA when it disciplined the Complainant for making pre-trip inspections that were more extensive than the Respondent's standard procedure (but which the ALJ found were reasonable). The ALJ found, based on his observations of the Complainant at two hearings, that the Complainant had suffered emotional distress as a result of the Respondent's retaliatory actions The Complainant had sought treatment with a psychologist, and the Respondent had not challenged whether Complainant suffered such distress. Reviewing other emotional damages awards to make a comparative award, the ALJ concluded that a modest award of $2,000 for emotional damages was appropriate under the facts of the case. The ALJ found that the Respondent's retaliation was not as egregious as taken by some employers in other cases and the evidence of emotional damage was not as extensive as in other cases.

[STAA Whistleblower Digest XIII C]
DEFERRAL TO ARBITRATION; ERROR TO DEFER WHERE GRIEVANCE PROCEEDING DISPOSED BASED ON SETTLEMENT

In ***Tuggle v. Roadway Express, Inc.***, ARB No. 03-081, ALJ No. 2003-STA-8 (ARB May 28, 2004), the Complainant had filed a CBA grievance and later a STAA complaint. The CBA grievance was settled. After DOL initially denied the STAA complaint, the Complainant requested a hearing before an ALJ. The ALJ granted the Respondent's motion to dismiss under 29 C.F.R. § 1978.112(c) based on deferral to the settlement of the CBA grievance. The ALJ found that the facts at issue were the same, that the settlement was "fair, regular and free of procedural infirmities." The ARB observed, however, that section 1978.112(c) also provides if a proceeding in another forum is "dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the [STAA] complaint." Since the Complainant's case was settled, the ARB found that his STAA rights were not adjudicated and consequently the ALJ erred in deferring to the settlement.

MISCELLANEOUS CASES

CONSTRUCTIVE DISCHARGE IN TITLE VII CASES; PLAINTIFF'S BURDEN OF PROOF; AVAILABILITY OF THE *ELLERTH/FARAGHER* AFFIRMATIVE DEFENSE

In *Pennsylvania State Police v. Suders*, __ U.S. __, No. 03-95 (June 14, 2004), the U.S. Supreme Court rejected a Third Circuit decision under Title VII that a constructive discharge, if proven, constitutes a tangible employment action that renders an employer strictly liable and precludes recourse to the *Ellerth/Faragher* affirmative defense. Justice Ginsburg wrote:

> Plaintiff-respondent Nancy Drew Suders alleged sexually harassing conduct by her supervisors, officers of the Pennsylvania State Police (PSP), of such severity she was forced to resign. The question presented concerns the proof burdens parties bear when a sexual harassment/constructive discharge claim of that character is asserted under Title VII of the Civil Rights Act of 1964.
>
> To establish hostile work environment, plaintiffs like Suders must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment." *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S. 57, 67 (1986) (internal quotation marks omitted); see *Harris* v. *Forklift Systems, Inc.,* 510 U. S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality."). Beyond that, we hold, to establish "constructive discharge," the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend

against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. In so ruling today, we follow the path marked by our 1998 decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, and *Faragher* v. *Boca Raton,* 524 U.S. 775.